

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 14-10**

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**ECONOCARIBE CONSOLIDATORS, INC.**

**COMPLAINANT**

**v.**

**AMOY INTERNATIONAL, LLC.**

**RESPONDENT**

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**COMPLAINANT'S REPLY TO RESPONDENT'S OPPOSITION TO MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

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Pursuant to 46 C.F.R. § 502.70, Complainant, Econocaribe Consolidators, Inc. (“Econocaribe”), by and through the undersigned counsel, hereby files its Reply to Respondent's Opposition to Motion for Partial Summary Judgment as to Respondent's violation of 46 U.S.C. § 41104(2)(A), 46 U.S.C. § 41102(c), 46 C.F.R. § 515.31(e), Sections 10(a)(1), 10(b)(1) and 10 b(2)(A) of the Shipping Act of 1984, as amended.

**CLARIFICATION AS TO 46 U.S.C. § 41104(2)(A) AND SECTION 10(B)(2)(A) OF THE  
SHIPPING ACT OF 1984, AS AMENDED**

Amoy objects to Econocaribe's motion for partial summary judgment in part on the grounds that Econocaribe's statement of facts and the supporting affidavit are devoid of any reference to a service contract and/or tariff between the parties. Econocaribe admits that a service contract with the definition of 46 U.S.C §40102(20) did not exist between the parties. However,

a tariff between the parties existed. The subject Econocaribe's Bill of Lading ("BOL") incorporates Econocaribe's Tariff by reference to the Tariff on the front side of the BOL. Econocaribe's Tariff also incorporates the Terms and Conditions on the reverse side of the Bill of Lading. Econocaribe's Tariff is published and filed with the Commission. A certified copy of Econocaribe's Tariff is attached as Econocaribe's Reply Exhibit 1.

*A. Violation of 46 U.S.C. § 41104(a)(A)*

It is undisputed that Amoy declared cargo as "Auto Parts (New)" while in fact the cargo was baled used tires. The said Tariff between Econocaribe and Amoy required Amoy to "declare [its] commodity by its generally accepted generic or common name." *See* Econocaribe's Reply Exhibit 1. There is no doubt the generally accepted generic or common name for used tires is not "new auto parts", not even "auto parts". Therefore, as a common carrier, Amoy provided service in the liner trade that was not in accordance with the classifications contained in a tariff. Consequently, Amoy has violated Violation of 46 U.S.C. § 41104(a)(A).

*B. Violation of Section 10(b)(2)(A) of the Shipping Act of 1984, as amended*

As stated above, it is undisputed that Amoy misdeclared the cargo and misdeclaration was contrary to the Tariff. The Tariff incorporates all the provisions of the BOL Terms and Conditions. Amoy's breach of the Terms and Conditions constitutes breach of Tariff. Therefore, Amoy violated section 10(b)(2)(A) of the Shipping Act of 1984, as amended.

*C. Amoy's Alleged Due Diligence Does not Create Grounds to Defeat the Summary Judgment*

In support of its claim of having exercised due diligence in ascertaining that the cargo was auto parts, Amoy provided a packing list (Amoy's Exhibit 4), a commercial invoice (Amoy's Exhibit 5), a shipper's letter of instruction (Amoy's Exhibit 6), emails purported to be between Krystal Lee and John Chen (Amoy's Exhibit 32), and Melissa Chen's unsigned

Declaration. Econocaribe objects to Exhibit 4, 5, 6, 32 as hearsay and lack of foundation and objects to Melissa Chen's declaration because it is unexecuted. *See* Complainant's Objections to The Declaration of Melissa Chen and Complainant's Responses to Respondent's Separate Statement of Disputed Facts and Complainant's New Statement of Undisputed Facts.

Should the Commission overrule Econocaribe's objections, such evidence is still irrelevant. Neither 46 U.S.C. § 41104(a)(A) or Section 10(b)(2)(A) of the Shipping Act of 1984, as amended, requires a complainant to show that the common carrier has failed to exercise due diligence in order to succeed in these claims. Amoy cited no authority that a carrier should not be held liable simply upon a showing that due diligence has been exercised.

Even if the evidence is relevant, Econocaribe presents evidence that refute Amoy's claimed due diligence. Amoy claims its business is related to the rubber and plastic industry and it specifically deals in scrap tires. *See* Econocaribe Reply Exhibit 2. This is admissible evidence because it is party-opponent statement and not hearsay under F.R.E. Rule 801. As an experienced used tire dealer, it beggars belief to suggest that Amoy did not know that the cargo was used tires.

#### **VIOLATION OF 46 U.S.C. § 41102(C)**

Amoy's violation of 46 U.S.C. §41102(c) is twofold:

First, Amoy's delivery of misdeclared cargo and then refusal to assist in repatriating it back to the U.S. is unjust and unreasonable. Amoy tries to conjure up facts suggesting it attempted to assist in repatriating cargo back to U.S. But the mere inquiry as to returning freight or a statement that "we sincerely just want to solve this matter the quickest possible" (Exhibit 11 to Amoy's Opposition Memo) and "I was requesting the return of the shipment soonest we found out there this was abandoned cargo" (in Amoy's Exhibit 12) are not sufficient to show its effort at mitigating damages and assisting in the repatriation of cargo. Amoy needed to nominate a

shipper and a consignee and pay storage and demurrage. Though Econocaribe objects to Amoy's Exhibit 6 on grounds of lack of authentication, assuming it admissible arguendo, the admission of Exhibit 6 tends to negate Amoy's claim of attempting to return the cargo. The bottom right of Exhibit 6 states "shipper instructions in case of inability to deliver consignment as consigned ...return to shipper." Pursuant to this contractual clause, when cargo was not delivered to the consignee, Amoy should immediately nominate the shipper as the consignee on the return bill of lading. It need not look to Econocaribe for buyers or instruction.

Second, given that Amoy admits that Krystal Lee had previously misdeclared cargo with other carriers, a reasonable and just practice would be either terminating her employment or exercising stringent supervision over her work. Apparently, Amoy did nothing related to correcting Krystal Lee's misconduct. Amoy's citation to *Chief Cargo Services, Inc. v. Federal Maritime Commission* is misleading. In that case, the Court did not reject the idea that 10(d)(1) extends to singular instances of misconduct, the Court simply withheld its ruling on this issue. *See Chief Cargo Servs., Inc. v. Fed. Mar. Comm'n*, 586 F. App'x 730 (2d Cir. 2014). Krystal Lee made similar misdeclarations within a very short period of time (she made the misdeclaration to ZIM on or about September 2012, only a few months preceding her booking with Econocaribe). *See Econocaribe's Reply Exhibit 4 and Request for Judicial Notice*. Such multiple similar acts within a short period of time, constitute a "practice." *See Chief Cargo Servs., Inc. v. Fed. Mar. Comm'n*, 586 F. App'x 730 (2d Cir. 2014).

#### **VIOLATION OF 46 C.F.R. §515.31(E)**

Melissa Chen's unsigned declaration cannot be used to conflict with John Kamada's signed and notarized affidavit. *See Fresno Rock Taco, LLC v. Nat'l Sur. Corp.*, No. CV F 11-0845 LJO BAM, 2012 WL 3260418, at \*7 (E.D. Cal. Aug. 8, 2012)(An unsigned affidavit or

declaration is an inadmissible document because there is no proof that the declarant saw the document or approved of its contents). Should Melissa Chen be allowed the opportunity to execute her declaration, her declaration only creates disputed facts as to whether Amoy actually knew that the cargo was used tire bales. As an experienced used tires and rubber dealer, it surely had reason to know that the booking and shipping documents were generated by Amoy's false or fraudulent statements. Econocaribe is still entitled to summary judgment on this count.

#### **VIOLATION OF SECTION 10(A)(1) OF THE SHIPPING ACT OF 1984, AS AMENDED**

Amoy claims that the Shipping Act of 1984 is not applicable to fraud or negligence claims, citing *Johnson Products Co. v. M/V La Molinera*. In that case, the shipper through its freight forwarder selected a NVOCC whom in turned engaged the defendant steamship line in carrying the goods. *Johnson Products Co. v. M/V La Molinera*, 619 F. Supp. 764 (S.D.N.Y. 1985). The defendant did not “by means of false billing, false classification ...*obtain or attempt to obtain* ocean transportation for property at less than the rates or charges that would otherwise apply.” *See* 46 U.S.C. 41102(a)(1)(emphasis added). Defendant did not obtain the OTI contract by false bill of lading. The fraud at issue was after-the-fact. After the transportation finished, the defendant carrier gave the shipper a fraudulent invoice based on a false and fraudulent bill of lading. *Johnson Products Co.*, 619 F. Supp. 764, 766 (S.D.N.Y. 1985).

The shipper in that case of course could not bring a claim under Section 10(a)(1) of the Shipping Act of 1984 for the fraudulent invoice. It therefore premised its fraud claim on Section 10(d) of the Shipping Act of 1984 which prohibited common carriers from failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property. *Id.* The shipper tried to argue that the carrier's fraud and misrepresentations constituted a “failure” cognizable under Section 10 or its

predecessor section. Responding to this argument, the district court said that “the legislative history of the 1984 Act makes clear, however, that behavior such as fraud and negligence does not come within the ambit of the Act.” However, the Court continued to say “Section 10 of the 1984 Act (which is nearly identical to section 17 of the 1916 Act) provides that no ocean freight forwarder ‘may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property’...” *Id.* This means that fraud and negligence do not come within the ambit of section 10 which requires just and reasonable practice. It does not mean that fraud can never come into the ambit of section 10(a)(1), whose plain language provides a cause of action for making false classification to obtain ocean transportation.

This case is entirely different from *Johnson Products Co.*, Amoy did obtain ocean transportation by means of false classification. As a preliminary matter, Section 10(a)(1) of the Shipping Act of 1984, as amended, applies to this case.

Although Amoy tries to create disputed facts as to whether Amoy “knowingly” or “willfully” obtain ocean transportation by false classification, unless Melissa Chen’s declaration is signed, there is no material facts for trial on its actual knowledge. However, Melissa Chen's declaration is irrelevant because the evidence shows that Amoy at least had acted recklessly in declaring the cargo. Being a used tire dealer, Amoy must have known that there was a substantial risk that the cargo was in fact used tires. Amoy's reckless disregard to a substantial risk satisfied the knowledge and willfulness requirement for a finding of the violation of Section 10(a)(1). *See Rose Int'l, Inc v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119, 164-165 (FMC 2001) (citing *Portman Square Ltd.,- Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 84 and *Ever Freight Int'l*, 28 S.R.R. 329, 333 (ALJ 1998)(it must be shown that a

person has knowledge of the facts of the violation and intentionally violates or acts with *reckless disregard* or plain indifference to the Shipping Act, or with purposeful or obstinate behavior akin to gross negligence). Econocaribe is entitled to summary judgment on this count, as a matter of law.

#### **VIOLATION OF SECTION 10(B)(1) OF THE SHIPPING ACT OF 1984, AS AMENDED**

There is no dispute that Amoy has directly (or indirectly) allowed another person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false classification or by any other unjust or unfair device or means. Amoy does not dispute that it and its shipper had obtained Econocaribe's ocean transportation by false tariff classification.

#### **ECONOCARIBE HAD REASONABLY MITIGATED THE LOSS**

Injured parties suffering from a breach of contract have a duty to mitigate damages. However, mitigation is not a defense to whether Amoy violated the Shipping Act. It is only relevant to the damages analysis. *Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G., Hapag-Lloyd America, Inc.*, 2014 WL 5316331, at \*12-13 (FMC). To the extent that Amoy alleges that Econocaribe exacerbated the damages, Amoy failed to prove that Econocaribe acted unreasonably under the circumstances to constitute failure to mitigate losses. *See Fortis Corporate Ins., S.A. v. M/V CIELO DEL CANADA*, 320 F. Supp. 2d 95, 105-06 (S.D.N.Y. 2004) ("The owner or consignee of the property has a duty to mitigate damages, but the burden of establishing that the cargo interests failed to act reasonably to mitigate damages falls on the party who has caused the situation that requires the mitigation of damages in the first place").

At all relevant times, Econocaribe presented available options to Amoy and asked Amoy to choose which option to take. Amoy is now blaming Econocaribe for not affirmatively telling it

to return cargo within the three-month limit. However, Amoy is a sophisticated shipper and NVOCC. It is familiar with detention and demurrage processes (even though it claimed to be unfamiliar with Maersk abandonment process). *See* Econocaribe Reply Exhibit 4 and Request for Judicial Notice. It is also familiar with Chinese Customs Regulations because it holds a Chinese maritime license and it immediately pointed out that the cargo was likely prohibited from entry into China after knowing that the commodities were recycled items. *See* Amoy's Exhibit 8. Without being prompted, Amoy initiated the idea of abandonment letter and understood such as a negotiating ploy. *See* Amoy's Exhibit 11. Amoy's claimed reliance on Econocaribe is unfounded.

Although on September 4, 2013, Maersk told Econocaribe that the best option was to re-export the cargo and record is unclear whether this information was relayed to Amoy, the failure (if there is one) to inform Amoy was harmless because, first, Amoy did not have commercial documents for re-export, second, Chinese Customs would have processed the re-export request as slowly as the abandoned process because Chinese Customs is very sensitive to restricted commodity. *See* Econocaribe Reply Exhibit 5.

Further, now with hindsight, we know that abandonment was not an option. Without the benefit of hindsight, abandonment was an option which even Maersk's September 4, 2014 correspondence did not rule out. *See* Amoy's Exhibit 19. Therefore Econocaribe's mitigation effort was not unreasonable. Further, Econocaribe has successfully negotiated the demurrage charge by a reduction of almost 60%. In order to avoid further demurrage, after Chinese Customs released the cargo, Econocaribe has prepaid all the return freight charges and other charges in order to bring the cargo back to U.S.

### **ECONOCARIBE'S DAMAGE**

As a direct result of Amoy's violation of the Shipping Act, baled used truck tires were misdeclared, shipped to China and seized by Chinese Customs. These baled used truck tires have been returned to the U.S. In order to mitigate the demurrage costs, Econocaribe entered into an agreement with Maersk to ship the cargo back to the U.S., even though Amoy refused to ship the cargo back to the U.S. or participate in the expense in any way. These used tires will be destroyed upon entry into the U.S. Amoy's violation of the Shipping Act gave rise to the demurrage charges, additional carriage, customs clearance, dray and subsequent destruction costs. Amoy's steadfast refusal to nominate a shipper or consignee leaves Econocaribe no choice but to pay such costs in advance. These costs are "actual injury" under 46 U.S.C. § 41305(a).

### **SUMMARY JUDGMENT IS APPROPRIATE**

The undisputed facts are clear: (1) Amoy misdeclared the cargo; (2) as a direct result, cargo was detained by Chinese Customs, (3) Amoy specialized in used rubber and used tires. Regardless of whether it had actual knowledge of false documentation or false tariff classification, it had constructive knowledge of such, (4) Econocaribe used reasonable efforts in mitigating the losses. Amoy created some "disputed facts" as to whether it had actual knowledge of false documentation or false tariff classification; however actual knowledge is not necessary in the finding of the violation of the Shipping Act. Amoy also created "disputed facts" as to its mitigation efforts; however what matters is Econocaribe's reasonableness in mitigating losses which Econocaribe has shown that it acted reasonably under the circumstances.

For the reasons set forth in the original Motion and this Reply, Econocaribe is entitled to an Order granting its Motion and a judgment for damages, including but not limited to a) costs for return freight, customs clearance, dray, and destruction, b) demurrage costs and c) for an

award of its attorney's fees, costs and prejudgment interest—all the foregoing amounts to be proven at a subsequent hearing.

DATED: January 26, 2015

**THE MOONEY LAW FIRM, LLC**

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing COMPLAINANT'S **REPLY TO RESPONDENT'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT** was sent to the below-mentioned counsel via email on January 26, 2015.

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**Neil B. Mooney, Esq.**